Report to the

Michigan Supreme Court

on

Proposed Domestic Violence Amendments to the Rules of Evidence

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Advisory Committee on the Rules of Evidence

April 9, 2003

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Introduction

In a letter dated January 17, 2002, Chief Justice Maura D. Corrigan requested that the Advisory Committee on the Rules of Evidence reconvene to address certain legislative bills that would purport to affect the rules of evidence in criminal prosecutions for domestic violence. Those initiatives resulted from the April, 2001 report and recommendations of the Governor's Domestic Violence Homicide Prevention Task Force, chaired by then Lieutenant Governor Dick Posthumus.

The Task Force report contained a variety of recommendations, a number of which have been enacted into law. The evidence proposals under discussion were two of thirteen additional proposals listed in the report as being in need of further research and evaluation.

The evidence proposals were put into the form of bills in both houses of the Michigan legislature in 2001. At the request of the Chief Justice, the executive and legislative branches of the government withdrew from consideration of them, concurrent with the Chief Justice's assurance that the Court would consider the propriety of amending the Michigan Rules of Evidence after receiving the report and recommendation of the Advisory Committee.

The original House and Senate bills have expired. On February 27, 2003 the proposed amendments were re-initiated with the introduction of Senate Bills 232 and 233, both of which were referred to the Committee on Judiciary.

Senate Bill 232, generally speaking, would abrogate MRE 404 to the extent that, in a criminal prosecution for domestic violence, evidence of a defendant's commission of prior acts of domestic violence would become admissible to show the defendant's propensity to commit such acts.

Senate Bill 233, generally speaking, would amend the rule against hearsay in prosecutions for domestic violence to admit in evidence the hearsay statement of an alleged victim if made in writing, if electronically recorded, or if made to a law enforcement official.

Before the first Committee meeting, the chair sent letters soliciting comments on the proposed amendments to the following:

1. Michigan Judges Association.
2. Prosecuting Attorneys Association of Michigan.
3. Criminal Defense Attorneys of Michigan.
4. Michigan Domestic Violence Prevention and Treatment Board.
5. The State Bar of Michigan.
6. State Appellate Defender's Office.

The Committee received written comments from the following in support of the proposed amendments:

1. Prosecuting Attorneys Association of Michigan.
2. Michigan Domestic Violence Prevention and Treatment Board.
3. Attorney General Jennifer Granholm.
4. Ronald J. Frantz, Ottawa County Prosecuting Attorney.
5. Catherine M. Castagne, Cheboygan Prosecuting Attorney.
6. James J. Gregart, Kalamazoo Prosecuting Attorney.
7. David L. Morse, Livingston County Prosecuting Attorney.
8. Gordon Shane McNeill, Barry County Prosecuting Attorney.
9. Frederick Anderson, Allegan County Prosecuting Attorney.

The Committee received written comments from the following in opposition to the proposed amendments:

1. Michigan Judges Association.
2. Criminal Defense Attorneys of Michigan.
3. State Appellate Defender's Office.

The Advisory Committee met in Detroit, Michigan on April 27 and July 13, 2002 to consider the proposals. The Committee consisted of the same persons appointed by the Court in May, 1999 to consider previous proposals to amend the rules of evidence:

Hon. William J. Giovan, Third Judicial Circuit, Chair
Hon. Ellen S. Carmody, U. S. Magistrate Judge
Hon. Judith A. Fullerton, Seventh Judicial Court
Hon. Dennis C. Kolenda, Seventeenth Judicial Court.
Hon. Wendy L. Potts, Sixth Judicial Court.
Hon. Thomas G. Power, Thirteenth Judicial Circuit.
Hon. Randy L. Tahvonen, Twenty-ninth Judicial Circuit.
John D. O'Hair, Detroit
James C. Howarth, Detroit
John W. Reed, Ann Arbor
Joseph C. Smith, Southfield
Supreme Court Commissioner Glen Gronseth, Reporter

The Committee recommends to the Supreme Court that it not adopt either of the proposed amendments to the rules of evidence.

Appended to this report are minority statements of the Honorable Dennis C. Kolenda and John D. O'Hair regarding issue 1, the admission of prior acts of domestic violence.

Discussion

1. The Admission of Prior Acts of Domestic Violence

In a prosecution for domestic violence, Senate Bill 232 would authorize evidence of a defendant's propensity for domestic violence by admitting evidence of prior acts of that kind, except where the court determines that the evidence is more prejudicial than probative under MRE 403.

We should begin with a recapitulation of the policy considerations behind the long-standing common law rule, now embodied in MRE 404, that bars evidence of character, whether shown by opinion testimony or by prior acts, to prove conduct in conformity with that character on a given occasion. Even though such evidence is logically relevant to prove conduct, it has been deemed more prejudicial than probative as a matter of law because (1) people do not always act in conformity to a given tendency, (2) the fact finder may be induced to find the accused guilty in spite of weak or insufficient evidence because he or she is a bad person, (3) the evidence tends to distract the fact finder from the issues in the case, and (4) the evidence causes the consumption of time and effort by the necessity of contests over collateral matters.

We begin by questioning whether there is a sufficient rationale to depart from these well established principles in prosecutions for domestic violence any more than in other actions, civil or criminal. In support of an exception it has been said, for example, (1) that first assaults are rarely reported to the police; (2) that domestic violence is a continuing and escalating offense, and (3) that a jury should have a complete picture of the dynamics of relationship violence. As for the first two factors, in any given prosecution they assume that prior offenses have been committed, thereby ignoring the consideration of the cost involved in litigating prior incidents. And even where a prior offense can be reliably established by evidence of a conviction - and perhaps especially then - the dangers of unfair prejudice are unacceptably flagrant. Those considerations are no less applicable to domestic violence prosecutions than to others.

As for the third rationale, the Committee accepts that in given circumstances it may be important to understand a prior relationship between the principals. Suppose, for example, that a defendant claims self-defense on the basis of evidence that the complainant was brandishing an item, e.g., a kitchen knife, in an offensive manner. To rebut the claim of self-defense it might be permissible to prove that the complainant grasped the item at the start of an affray solely because of well-founded fear of injury occasioned by past assaults by the defendant. In such a case the evidence of past assaults by the defendant would be offered for noncharacter purposes and would not be barred under the existing rules. Indeed, MRE 404(b)(1), "Other crimes, wrongs, or acts," contains a nonexhaustive list of many circumstances under which evidence of other acts might be properly received for noncharacter purposes. In short, in any case where there is a legitimate noncharacter purpose for understanding the prior relationship of the parties, the evidence will be admissible under the existing rules.

The Committee is aware, of course, that the problem of domestic violence has received heightened public scrutiny in recent years, and justifiably so. A number of measures have been undertaken toward the reduction of this problem, including, for example, the now widespread use of personal protection orders. The Committee believes, however, that the efforts expended toward the reduction of domestic violence should not go so far as to undermine basic and salutary rules of evidence that have evolved in favor of the accurate and expeditious resolution of disputed charges.

Even less should we favor the prospect that procedural safeguards will be incrementally diminished, piece by piece, as particular crimes should successively grasp public attention. This unhealthy trend may have already started in the federal jurisdiction. In spite of the unusual unanimous opposition of all the judge and attorney members of every advisory committee that considered them (except for representatives of the Department of Justice), Congress wrote Rules 413, 414 and 415 into the Federal Rules of Evidence, allowing evidence of similar crimes in sexual assault and child molestation cases, with the passage of the Violent Crime Control and Law Enforcement Act of 1994. We recommend that the Court not follow a similar course in the name of combating domestic violence.

In the aftermath of the acquittal of the person charged with the murder of Nicole Brown Simpson, the State of California amended its evidence code to admit a defendant's "commission of other domestic violence" in the prosecution of an offense involving domestic violence. Cal Evid.Code §1109. Large numbers of the population reacted to the defendant's acquittal with disappointment, disgust, or anger. Their reaction may have been justified. Nevertheless, should otherwise sound principles of law be abrogated because of an aberrant result in one notorious case? What safeguard should we expect to fall with the next disappointment? Indeed, would the result of the Simpson trial have been different if §1109 had been in effect?

The Committee notes that past departures from the character evidence rule have come to grief. A notorious exception to the common law rule allowed into evidence the prior sexual conduct of the complainant in a charge of rape. The mischief of that exception lasted for years and did not come to an end until the enactment of rape-shield statutes across the country, Michigan's version being found in MCL 750.520j.

More recently, with the original enactment of Federal Rule of Evidence 404(a)(2) and its state counterparts, in what was probably an unintended departure from the common law rule, the character of an alleged victim of crime became generally open to exploitation, so long as it was "pertinent," leading to the strange result, for example, that in a prosecution for an assaultive crime, the character of the complainant for violent behavior would be admissible, but that of the defendant would not. The federal rules have attempted to cure this imbalance by an amendment making the accused's character admissible in the same regard as in the attack on the complainant. The Michigan Supreme Court took what we consider to be the more reasonable and obvious course and amended MRE 404(a)(2), effective September 1, 2001, to restore a victim's immunity from character attack to its former scope.

If a rule like the one under consideration should be enacted, we will have created another evidentiary anomaly, diametrically opposite from the one recently corrected by the court, and even more forensically repugnant than the former, in that the burden of character attack would be thrust upon the party, and only that party, who is supposed to have the benefit of the presumption of innocence.

It is true that the Senate bill would allow a trial judge to exclude evidence of prior acts of domestic violence if determined to be more prejudicial than probative. But MRE 404 embodies the experience of the common law that character evidence to prove conduct is more prejudicial than probative as a matter of law, leaving the trial judge without authority to admit such evidence, other than for enumerated exceptions. Our jurisprudential heritage has been that judges are as much bound by the law as are others. And while there must necessarily be many areas of discretion afforded to the court in the conduct of a trial, that discretion has generally not extended so far as to render the rules of exclusion optional by the choice of the judge. The Committee believes that the character evidence rule should be preserved in domestic violence prosecutions as well as in others, instead of being applied according to the happenstance of preference from one courtroom to another.

2. The Admission of Hearsay Accusations

The principal reason for the initiative to allow in evidence hearsay statements regarding domestic violence is said to be that many victims of domestic violence, usually women, recant their original complaints to the police or refuse to testify, the refusal sometimes being the result of intimidation from the offender.

The gist of Senate Bill No. 233 is that it would allow hearsay statements of a declarant in a prosecution involving domestic violence if

1. the statement describes the threat or infliction of physical injury,

2. the statement was made at or near the time of the threat or injury,

3. the statement was made in writing, was electronically recorded, or was made to a law enforcement official, and

4. the circumstances of the statement indicate that it is trustworthy.

The bill includes a nonexclusive list of factors to be considered in evaluating the trustworthiness of the statement:

1. whether the statement was made in anticipation of litigation,

2. whether the declarant has a motive for fabrication, and

3. whether the statement is corroborated by other evidence.

We should first recall the place that the rule against hearsay occupies in our jurisprudence. Professor John Henry Wigmore calls it "that most characteristic rule of the Anglo-American Law of Evidence – a rule which may be esteemed, next to jury trial, the greatest contribution of that eminently practical legal system to the world's methods of procedure." 5 Wigmore Evidence, §1364, at 28 (Chadbourn rev. 1974). It goes without saying that proposed incursions against this fundamental rule should be carefully assessed.

One of the reasons for close scrutiny of a newly proposed exception to the rule against hearsay is that the several hundred years' experience with the rule has already developed numerous exceptions. Among those already listed in MRE 803 are several that are potentially relevant in a prosecution for domestic violence:

> (1) *Present sense impression.* A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.
>
> (2) *Existed utterance.* A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.
>
> (3) *Then existing mental, emotional, or physical condition.* A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition....
>
> (4) *Statements made for purposes of medical treatment or medical diagnosis in connection with treatment.* Statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment.
>
> (5) *Recorded recollection.* A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately....

These exceptions, of course, have evolved over the years on the basis of the various guarantees of trustworthiness that justify them, whereas no such trustworthiness is afforded by nothing more than naming a variety of crime in which hearsay statements will be used. In a real way, moreover, the existing exceptions are less restrictive than those identified in the bill because, except where otherwise specified, they are not limited to statements made in writing, recorded, or made to police; nor are they limited to statements disclosed by advance notice.

A recently added exception to the hearsay rule, furthermore, seems particularly applicable to one of the considerations that motivated the senate bill, i.e., the refusal of victims to testify because of intimidation from the accused. Effective September 1, 2001, subsection (b)(6) was added to MRE 804, "Hearsay Exceptions; Declarant Unavailable:"

> (6) *Statement by declarant made unavailable by opponent.* A statement offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

It is true, of course, that the conditions of the rule must be satisfied to render the statement admissible. But it is also true that a court can employ hearsay in determining preliminary questions of fact concerning the admissibility of evidence. MRE 104(a).

In the unlikely event that all of the foregoing is insufficient, there is still the so-called residual exception to the hearsay rule, MRE 804(b)(7):

> (7) *Other Exceptions.* A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

The Committee does not endorse indiscriminate use of the residual exception. Nevertheless, it is much like the exception afforded by the senate bill, particularly regarding the scope of discretion given to the trial court, while not containing the restrictions contained in the senate bill.

In sum, it appears that the existing rules of evidence are ample enough to encompass all or most of the objectives sought by the proposed hearsay exception. To engraft the proposed amendment on the existing rules, the Committee believes, can only promote the incoherence of the rules of evidence.

Let's suppose, then, that it should be proposed as an alternative that hearsay complaints of domestic violence should be admissible without the strictures of the senate bill and beyond the exceptions afforded by the present rules. We believe that such an expansion, made for the sake of combating domestic violence, would be a serious mistake.

The Committee's view in this regard is fortified by conversations had by the chair with two assistant prosecuting attorneys, both from sizeable offices in the lower peninsula of Michigan and both of whom have significant responsibility regarding the prosecution of charges of domestic violence. Because of the positions they occupy, they spoke on condition that they remain anonymous.

Both of the prosecutors were emphatically opposed to creating an exception to the hearsay rule for the sake of charges of domestic violence. One of them made the following points:

1. Much of the impetus toward admitting hearsay statements is based on the presumption or supposition that all or nearly all complaints of domestic violence are valid. But that is far from the truth. A large number of them, perhaps as many as thirty percent, prove to be false. The lack of merit in such reports, which are sometimes made for ulterior motives, is one of the reasons why many complainants later decline to cooperate with prosecution.

2. Regardless of efforts to encourage police to make accurate complaint reports, an unacceptable number of them contain errors, leading to the potential for unjust convictions if such reports can be used as evidence. When those errors are combined with complaints that are false from the start, the potential for injustice is greatly magnified.

The Committee believes that the present rules are ample enough to provide legitimate and applicable exceptions to the hearsay rule, without the questionable device of superimposing crime-specific exceptions. To the extent that exceptions may be created that exceed the limits of trustworthiness identified by centuries of experience, such amendments would, in the end, create more danger than they would avoid.

The proposals evaluated by the Committee in this report are motivated by the laudable objective of reducing the incidence of domestic violence, one which the Committee wholeheartedly endorses. The initiative to amend established rules of procedure in pursuit of that goal, however, reminds us of a passage from *A Man For All Seasons*, Robert Bolt's play about Thomas More, one of history's great lawyers. In this scene, More's wife, Alice, and his son-in-law, Roper, chide him for not arresting a person thought to be evil, but who has committed no crime:

ALICE: While you talk, he's gone.

MORE: And go he should if he was the devil himself until he broke the law.

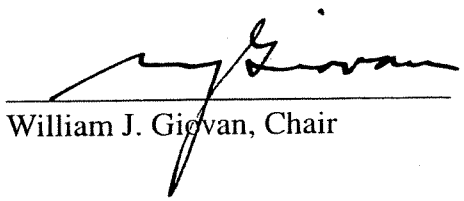
ROPER: So now you'd give the Devil benefit of law.

MORE: Yes, what would you do? Cut a great road through the law to get after the Devil?

ROPER: I'd cut down every law in England to do that!

MORE: Oh? And when the last law was down – and the Devil turned round on you – where would you hide, Roper, the laws all being flat?

For the Committee,



William J. Giovan, Chair

April 9, 2003

I respectfully disagree with the majority's decision to recommend to the Supreme Court that no changes be made to MRE 404 to allow some evidence in domestic violence prosecutions of prior such conduct by the defendant. That rule is based on the premise that prior criminal behavior is not probative of the likelihood of subsequent criminal behavior. It is now accepted, however, I believe, that some behavior genuinely reflects a propensity to that kind of behavior. See *People v Sabin* (aft rem), 463 Mich 43, 60-61, fns 7, 8 (2000). Domestic violence and pedophilia are prime examples. Therefore, not permitting evidence of prior incidents of such behavior withholds relevant proofs, skewing the factfinding process. Permitting such evidence would, it follows, enhance the factfinding process and, because the evidence is relevant, cannot be said to unfairly prejudice an accused. As a result, I suggest that MRE 404 be amended as follows:

RULE 404 CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES

(A) Same.

(B) ***Other crimes, wrongs, or acts.***

(1) Except as permitted by subparagraph (b)(2), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

(2) In prosecutions for criminal sexual conduct involving a child under the age of 16, and in prosecutions for assault on spouses, former spouses, persons with whom the defendant has a child in common, and persons with whom the defendant has lived in the same household for longer than one month, evidence of similar conduct by the defendant is admissible, provided the similar conduct is established by a conviction, a confession or admission by the defendant, or an eyewitness.

(3) The prosecution in a criminal case shall provide ~~reasonable~~ notice *at least 28 days* in advance of trial, ~~or during trial if~~ *unless* the court *permits shorter notice or* excuses pretrial notice on good cause shown, of the general nature of any evidence it intends to introduce at trial *pursuant to subparagraphs (b)(1) and (b)(2)* and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence pursuant to that subparagraph. If necessary to a determination of the admissibility of the

evidence under this rule, the defendant shall be required to state the theory or theories of defense, limited only by the defendant's privilege against self-incrimination.

Although the issue before the Advisory Committee was only domestic violence, my proposal deals with both it and pedophilia because both involve conduct which is probative of a propensity. Dealing with both at once seems prudent and efficient. The committee did consider my proposal, but rejected by a narrow margin. I fully respect the contrary views of my colleagues, but believe that the above alternative should be considered by the Supreme Court. At a minimum, considering it will initiate the "thorough debate" mentioned in *Sabin, supra*, at fn 8.

What I propose has been structured to not overreact to recent developments and to provide meaningful protections against the misuse of information. For example, while it is now accepted that pedophilia betrays a propensity, it may not yet be as accepted that prior sexual misconduct with an adult is similarly probative of future sexual misbehavior. Hence, my proposed rule is limited to sexual misconduct with children. With regard to domestic violence, the proposed rule is careful to identify only relationships which were truly domestic, not situations which may have involved general assaultive behavior. That is why dating relationships do not give rise to potentially admissible evidence, but only relationships which involved living in the same household for a period of time.

The proposed rule also limits how prior misconduct can be proven to particularly persuasive evidence: a conviction, a confession or admission by the defendant, or an eyewitness. Those limitations are designed to preclude opening the door to proving prior domestic violence by excited utterances, present sense impressions, and medical records. While all are admissible, such evidence risks relying heavily on secondhand proof. A conviction, on the other hand, necessarily means that there was evidence convincing beyond a reasonable doubt or that there was a plea. Confessions and admissions necessarily come from the accused, not from someone else. Eyewitnesses will either be the victim of prior abuse or someone who actually saw what happened, e.g., a family member, a responding police officer, etc. So limiting how prior incidents can be proven will limit utilization of the rule to prior incidents which almost surely occurred, minimizing the risk to the accused that fabrications or exaggerations are used.

The rule I propose also requires significant pre-trial notice of plans to utilize prior incidents. That way, an accused will have ample opportunity to investigate the evidence he or she will later confront and to learn of ways to undermine or rebut it, if there are flaws with it. In sum, I think the proposal is a balanced effort to bring MRE 404 in line with modern experience, while affording realistic protections to accused.

Committee Member O'Hair Concurs in Part and Dissents in Part

For what I believe are compelling reasons, I must disagree with that part of the Committee's report and recommendations opposing any amendment to MRS 404 incorporating the objective of Michigan Senate Bill 232 to allow evidence of similar acts in domestic violence prosecutions.

The Supreme Court of Michigan requested the Advisory Committee on Rules of Evidence to review proposed legislation that would allow, in criminal prosecutions for domestic violence, evidence of an accused's prior acts of domestic violence and a victim's statements concerning the infliction or threats of physical injury. The proposed changes would impact specifically Rules 404 and 803 of the Michigan Rules of Evidence.

It was the consensus of the Committee that formulation of rules of evidence is in the domain of the Supreme Court and that legislative enactment of the proposed modifications to existing rules would be inappropriate, if not violative of the constitutional concept of separation of powers.

As to the merits of the proposals, there was again consensus that an MRE 803 specific exception for the hearsay statements of domestic violence victims was both unwise and unnecessary. Presently many such statements may qualify for admission under MRE 803(1), (2), (3), (4), (5), or (24).

However, the committee was divided on whether MRE 404 should be amended to allow evidence regarding prior acts of domestic violence committed by the accused in order to prove he committed the act of domestic violence constituting the subject of a criminal prosecution. A majority of the committee members opposed amendment for various reasons. It appeared that the opposition was based on concerns about undue prejudice to the accused and the creation of a "slippery slope". I believe that the arguments for change are much stronger and that a rational basis for change exists -- change that has a much broader impact than that contemplated by the legislative proposal.

The search for the truth is frequently a very difficult undertaking for the trier of fact, particularly when the act in dispute is one that is committed in privacy or clandestinely. Acts of spousal abuse or pedophilia almost invariably do not occur in a public arena. They occur in the privacy of the home or some secluded location. Most often the only witnesses to the wrongful act are the perpetrator and the victim.

Domestic violence and pedophilia are societal problems of tremendous magnitude, and those who commit such crimes should be held accountable through our justice system. If they are not, there is no justice for the victim and certainly no deterrence for the perpetrator. Highly probative evidence of domestic violence and pedophilia should not be withheld from the fact-finder.

When we consider prior or subsequent acts as evidence of a similar act of which a defendant is accused, we are considering circumstantial evidence with probative value and not evidence of the accused's general character. A person predisposed to commit a particular kind of act is more likely to commit such an act than one who is not so predisposed. For example, there are people who commit the same type of crime over and over again, i.e., spouse abuse, pedophilia, shoplifting (retail fraud), car theft, counterfeiting, credit card fraud, and uttering and publishing. They are repeat offenders. For some of these offenders it is not unusual to have a criminal history reflecting three, five, ten or more convictions for the same offense. In these situations, the past occurrences are circumstantial evidence of more than propensity to do a like act. They constitute probative circumstantial evidence of the commission of the act.

The larger the number of similar acts, the greater their probative value. One or two similar acts or similar acts remote in time would be subject to exclusion under MRE 403 on the basis that their ". . . probative value is substantially outweighed by the danger of unfair prejudice." However, when similar acts are numerous and not remote in time, they are highly probative, not unfairly prejudicial, and consistent with the ultimate objective of the Michigan Rules of Evidence. MRS 102 states:

> "These rules are intended to secure fairness . . . and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."

Under MRE 403 relevant evidence is inadmissible "if its probative value is substantially outweighed by the danger of unfair prejudice." Evidence of predisposition or tendency is highly probative in aiding the trier of fact in finding the truth. MRE 403 should not be considered a shield from the truth or a barrier to relevant circumstantial evidence possessing great probative value.

By amending MRE 404(b)(1) to allow evidence of prior or subsequent acts of like kind as circumstantial evidence of an accused's predisposition to commit such acts, the search for truth becomes more rational and less difficult. All incriminating evidence is prejudicial to an accused, but it does not become unduly prejudicial when it possesses high probative value, for example, a confession of guilt.

Both in the federal system and in the State of California, prior acts of sexual assault and child abuse are admissible as circumstantial evidence of the perpetrator's commission of a subsequent similar act. When the Michigan Rules of Evidence were adopted by the Supreme Court in 1978, one of the basic considerations was the adoption of a state code of evidence that paralleled the Federal Rules of Evidence. The rationale was that practice in both the state and federal courts would be facilitated greatly by having uniform evidentiary rules for both forums. The FREs have been amended to allow in criminal prosecutions evidence of prior acts of domestic violence and child abuse subject to comparable MRE 403 restrictions.

The slippery slope argument advanced in opposition to change has no application here. MRE 404(b)(1) already permits evidence of prior acts in many specific instances and the proposed change would simply by clarification add to that extended list. The language of MRE 404(b)(1) clearly indicates that the listed exceptions are intended to be illustrative, not restrictive.

In reality, the amendment suggested below does not effect a substantive change in the rules, but is simply one of clarification.

In conclusion, my recommendation is that MRE 404(b)(1) be amended to read as follows:

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, a system in doing an act, knowledge, identity, or absence of mistake or accident, OR PREDISPOSITION TO COMMIT A SPECIFIC KIND OF CRIME, WRONG, OR ACT* when the same is material, whether such other crimes, wrongs or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case."

(* Underscoring indicates suggested amendatory language.)

The suggested amendment to MRE 404(b)(1) does not focus on any specific criminal acts, but focuses on the admissibility of relevant evidence. Similar acts evidence is circumstantial evidence, not evidence of a person's character. Its probative value is high and should be admissible when relevant to aid the trier of fact in finding the truth.